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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 02 089 52626 Office: VERMONT SERVICE CENTER Date: OCT 01 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a wholly owned subsidiary of a Canadian corporation organized in 1978. The petitioner carries out the management of the Four Seasons Hotels in North America. It seeks to employ the beneficiary as its pastry chef. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.[1]

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive

[1] Counsel for the petitioner provides sufficient explanation and evidence demonstrating that the director's decision was not properly mailed to the petitioner or to the petitioner's counsel of record. The AAO accepts counsel's brief on appeal as timely filed.

capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary's assignment for the petitioner will be primarily managerial. The petitioner does not contend that the beneficiary's assignment is executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

In a January 9, 2002 letter appended to the Form I-140, Immigrant Petition for Alien Worker, and in a May 23, 2002 letter in response to the director's request for evidence, the petitioner described the beneficiary's duties and weekly hours spent on the duties as:

- Hire, train, motivate, and discipline all pastry shop employees. (Continuous, as needed.)
- Schedule all pastry employees. (0.5 hours)
- Communicate regularly with the Executive Chef to achieve an excellent rapport throughout the food production department and in developing new menu items. (3 hours)
- Requisition all items needed for the following day from the food storeroom, non-food storeroom, and stewarding department. (3 hours)
- Ensure proper sanitation procedures are followed and the pastry shop s always clean, neat and orderly. (Continuous)

- Ensure all equipment is in full working order. (Continuous)
- Ensure a superior production of sweet items, pastries, cakes, ice creams, sorbets, fruit compotes, breads, chocolates, etc. for all outlets as well as banquets and amenities. (Ongoing daily)
- Ensure an adequate supply of all product prepared on a timely basis. (Continuous)
- Develop new menu items and pastries, including training staff to prepare such items. (15 hours per week)
- Making showpieces as needed and preparing exciting and appealing petit fours and mignardises. (Up to 15 hours per week)
- Responding properly in any hotel emergency or safety situation. (As needed)

The petitioner also noted that the beneficiary had full discretionary authority over the operation and management of the Pastry Shop and its eight employees including an assistant pastry chef. The petitioner also acknowledged that preparing and developing product was generally not considered managerial. The petitioner contended, however, that experimenting and developing and then training the staff in the proper preparation is managerial. The petitioner asserted that creating specialty items and showpieces demonstrated culinary artistry and necessarily would be prepared by a talented individual such as the beneficiary.

The petitioner also included a job description for the assistant pastry chef that primarily tracked the duties and responsibilities detailed in the description for the pastry chef position. The petitioner's job description for the beneficiary's other subordinates showed individuals performing the operational tasks associated with producing pastries.

The director determined that the beneficiary's position description and title indicated that the beneficiary would be performing non-qualifying duties for this employment-based immigrant petition. The director observed that the beneficiary's subordinates' duties did not include managerial or executive duties. The director also inexplicably added that the beneficiary's duties did not appear so complex that the duties should be considered professional.

On appeal, counsel for the petitioner asserts that: the beneficiary's eligibility for L-1A nonimmigrant intracompany transferee status had been clearly established; the beneficiary meets the definition of a manager as enunciated in *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) as the beneficiary's duties are primarily managerial; and, the director improperly applied the H-1B specialty worker criteria by concluding that the preponderance of the beneficiary's job duties be so complex that they could be considered professional.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The beneficiary in this matter spends a majority of his time developing and preparing new menu items and creating specialty showpieces. The petitioner acknowledges these tasks are traditionally not managerial tasks. The petitioner's contention that training others to perform these tasks elevates the beneficiary's position to a managerial position as defined by the statute is not persuasive. The record does not support a conclusion that the beneficiary's primary task is to train others, but rather his primary task is to

prepare and develop new items and create specialty items and showpieces. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The beneficiary's additional duties of ordering products and scheduling employees are also tasks that are non-managerial as defined by the statute and case law interpreting the statute. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel asserts that the beneficiary is both an "activity" and a "function" manager. However, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial. Here, the petitioner indicates that the beneficiary spends approximately 35 hours performing tasks that do not fall directly under traditional managerial duties. Moreover, this evidence contradicts counsel's assertion that the beneficiary's "hand-on" production of items is limited. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the AAO cannot determine from the assistant pastry chef's job description that this position includes primarily supervisory duties. Thus, counsel's assertion that the beneficiary manages a supervisory employee is not substantiated in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, although the petitioner has shown that the pastry shop is one of the petitioner's essential functions or components, the petitioner has not demonstrated that the beneficiary's daily duties comprise managing the function rather than performing the culinary duties relating to the success of the function. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.*

In sum, the petitioner has not established that the beneficiary's primary assignment will be managerial.

Counsel's implicit assertion that the past approvals of the beneficiary's status as an L-1A intracompany transferee require the approval of this petition is not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same evidence provided in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International, supra.* It would be absurd to suggest that Citizenship and Immigration Service (CIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service

center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).
The AAO notes that the director improperly included a determination that the beneficiary's job duties should be sufficiently complex to be considered professional. Such a determination is irrelevant to this proceeding. However, the director properly determined that the description of the beneficiary's job duties established that the beneficiary would be primarily performing non-managerial tasks for the petitioner.

Beyond the decision of the director, the petitioner has not established that the beneficiary's duties for the foreign entity comprise primarily managerial duties. The record does not differentiate the beneficiary's duties for the petitioner from the duties for the foreign entity so that the beneficiary's foreign position could be considered managerial. For this additional reason the petition will not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.